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No. 94-1323

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

FLOYD T. BRYAN, and
FLOYD T. BRYAN, M.D., P. A.

Petitioners,

vs.

JAMES E. HOLMES REGIONAL
MEDICAL CENTER, a/k/a/ HOLMES
REGIONAL MEDICAL CENTER, INC.

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

February 23, 1995

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QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals correctly determined that the Hospital was immune from liability for monetary damages under the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§ 11101-11152, where the court determined that all of the standards of the Act were met, including the presence of a "reasonable belief" on the part of the Hospital that its peer review action "was in furtherance of quality health care."

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STATEMENT OF THE CASE AND FACTS

Petitioners ask this Court to grant a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals holding that the respondent Hospital is immune under the Health Care Quality Improvement Act ("the HCQIA" or "the Act") from liability for monetary damages due to its decision to terminate staff privileges for Dr. Bryan. Petitioners' Statement of the Case omits or misstates the material facts relied on by the lower court in rendering its decision. Those facts and the procedural history of this case are set forth in detail in the lower court's opinion.[1/] They may be briefly summarized as follows.

Respondent Holmes Regional Medical Center is a non-profit corporation operating a private hospital in Melbourne, Florida.[2/] A. 15. Dr. Bryan was granted staff privileges in 1976 but he engaged in disruptive behavior from the outset of his association with the Hospital. A. 22-23. As noted in the Eleventh Circuit's opinion, Dr. Bryan "exhibited a pattern of unprofessional conduct over a period of many years, and he was given a series of opportunities to remedy his difficulties in interacting with other staff members." A. 44-45. Several illustrative incidents are described in the court's opinion. A. 24-25. Dr. Bryan conceded that the complaints about his conduct were not "fabrications" and that he had a problem with his temper and with his inter-personal dealings with his colleagues and the Hospital staff. A. 23; *see also* R18-1545, 1637, 1645.

Ultimately, the Hospital's Board of Directors advised Dr. Bryan that his abusive behavior would not be tolerated any longer and that any further incidents of unprofessional behavior would

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1/ The Eleventh Circuit's opinion is contained in Volume 1 of petitioners' appendix at A. 1-52.

2/ The Hospital has no parent companies or subsidiaries to be listed pursuant to Sup. Ct. R. 29.1.

result in the permanent revocation of his privileges. A. 26. When additional incidents nevertheless occurred, a peer review hearing was held, as provided in the Medical Staff by-laws. A. 27-28. The panel unanimously found that the most recent incidents "were amply supported by the record." A. 30. Concluding that Dr. Bryan's behavior was below acceptable standards and adversely impacted upon the Hospital's ability to deliver quality patient care, the panel recommended a two year suspension. A. 30-31.

On appeal by Dr. Bryan to the Hospital's Board of Directors, the Board adhered to its prior decision that any further instances of unprofessional conduct would lead to the termination of Dr. Bryan's privileges. A. 31. As reflected in the Eleventh Circuit Court's opinion:

> [T]he Hospital concluded that, because of his behavior, Bryan's presence in the operating room and in patient rooms was disruptive and interfered with the important work of other employees. Moreover, the board was properly concerned about the circumstances surrounding the misdirection of the two patients to surgery.

A. 45. Accordingly, the Board voted unanimously to terminate Dr. Bryan's clinical privileges. A. 31.

Before his staff privileges were terminated, Dr. Bryan received the full panoply of procedural protections set forth in the HCQIA. A. 44-50; *see also* A. 22-32. In the words of the Eleventh Circuit, which carefully reviewed in Part II of its opinion the peer review process at issue in this case, "each of these procedural requirements of section 11112(b) was satisfied." A. 49. Thus, Dr. Bryan was:

> (1) advised of the intended disciplinary action against him and the reasons for such action [Ex. 232, R13-158];

(2) advised of his right to request a peer review hearing and the time limit for requesting peer review [*Id.*];

(3) given timely notice of all proceedings by the Hospital related to the revocation of his staff privileges [R19-1894; Ex. 237, R23-2480];

(4) given prior notice of the procedures to be utilized at the peer review hearing, and of the witnesses who would testify against him at the hearing and the nature of their expected testimony [R15-719-20; Exs. 237-38, R23-2480-81];

(5) advised of the hearing officer and members of the peer review panel appointed by the Hospital, none of whom were in direct competition with Dr. Bryan [*Id.*], and given the opportunity to object to the proposed hearing officer and members on grounds of bias or conflict of interest, which opportunity he took advantage of [R19-1892; Ex. 237];

(6) provided with the opportunity to and did attend the peer review panel hearing with counsel of his choice [R13-20; R15-721, 726; R19-1894-95];

(7) permitted to cross examine the witnesses against him and present his own witnesses [*Id.*, R13-204-05];

(8) had the opportunity to obtain a written transcript of the proceedings before the peer review panel upon payment of reasonable charges for the preparation thereof [R17-1186-87];

(9) had the opportunity to present evidence deemed relevant by the hearing officer to the peer review panel, whether or not such evidence was admissible in a court

of law [Pl. Ex. 148, ¶ 43.6, R13-141; *See, e.g.*, Pl. Ex. 168, R13-196];

(10) given a written report containing the recommendations of the panel and a statement of the basis for the recommendations [R15-737; Pl. Ex. 401, R12-91];

(11) given notice of the Executive Committee's recommendation to the Board following peer review and notice of his right to appellate review [Ex. 245, R23-2486];

(12) provided with appellate review of the recommendation of the Executive Committee to the Board following peer review before a panel of Board Members, including the right to submit written or oral argument to the members of the appellate panel [Pl. Ex. 148, ¶ 44.1; Exs. 245-47, R23-2486, 2499-2500]; and

(13) given written notification of the Board's final decision, including a statement of the basis for the decision [R14-373; Ex. 251, R23-2503].

Following his termination from staff, Dr. Bryan sued the Hospital, the individual members of the Board of Directors, the physicians who were members of the Hospital's Medical Executive Committee, and two nurses. A. 32. The complaint included federal and state antitrust claims as well as state law claims for defamation, negligent supervision of the peer review process, and breach of the Medical Staff by-laws. *Id.*

By summary judgment order, the district court dismissed Dr. Bryan's federal and state antitrust claims for damages but held that he could assert a claim for injunctive relief under the antitrust laws. A. 34. The court also granted summary judgment on Dr. Bryan's claims against the members of the Board of Directors. *Id.* However, the court denied the Hospital's motion for summary

judgment based on the immunities provided by the HCQIA and by state law. A. 33-34.

At the close of Dr. Bryan's case, the court directed a verdict in favor of all the remaining individual defendants. A. 35. The court held that there was no evidence of any conspiracy, [R20-5-6], and noted that there had been "fifteen years of complaints" concerning Dr. Bryan's conduct, and no "nexus between those complaints and any of the defendants." R22-2003. The court further determined that none of the individual defendants was a direct economic competitor of Dr. Bryan. *Id.*; R20-5-6. The court denied the Hospital's motion for a directed verdict based upon the HCQIA. A. 35.

Under instructions and a verdict form that were objected to by the Hospital, the jury returned a verdict for Dr. Bryan, finding that the Hospital had terminated Dr. Bryan in violation of its by-laws and awarding Dr. Bryan $4,181,242, and further finding that the Hospital had violated state and federal antitrust laws. A. 35-36. The district court denied the Hospital's post-trial motions, including its motion for judgment based on the HCQIA immunity. A. 40, n.27.

The Eleventh Circuit reversed. The court specifically determined that "[t]he record in this case reveals that revocation of Bryan's privileges was prompted by the reasonable belief that doing so would promote quality health care." A. 44. It further concluded that the record established that the Hospital's action satisfied the other standards of the HCQIA. A. 45-51. The court accordingly held that the Hospital was "entitled to the immunity from damages liability granted by HCQIA in §11111(a)." A. 51. Petitioners' Suggestion for Rehearing En Banc was denied.

SUMMARY OF ARGUMENT

In holding that the Hospital could not be held liable for monetary damages for its peer review decision in this case, the Eleventh Circuit faithfully applied the immunity provision under the HCQIA in accordance with its explicit standards. Its decision presents no conflict with any decision of this Court or any other circuit court. Based on the facts of this particular case, its decision affording the Hospital HCQIA immunity was eminently correct. Accordingly, the petition for a writ of certiorari should be denied.

ARGUMENT

Petitioners ask this Court to exercise its discretion to review the Eleventh Circuit's decision on the ground that it improperly construed the HCQIA and impermissibly denied petitioners their right to a jury trial by holding that the Hospital was entitled to the immunity from liability for damages afforded under that Act. There is nothing about petitioners' challenge of the Eleventh Circuit's decision that warrants plenary review by this Court. To the contrary, that decision is carefully reasoned and based on the court's thorough consideration of the record. Moreover, it is fully consistent with the decisions of the other circuit courts that have construed and applied the HCQIA to preclude damages liability for a hospital peer review decision which complied with the standards set forth in the Act.

In short, this is a straight-forward case of statutory construction. There is no conflict among the circuits as to how the HCQIA should be applied, and there is nothing else about this case that warrants this Court's attention. Petitioners simply quarrel with the outcome of the Eleventh Circuit's application of the HCQIA's immunity to the Hospital in this case.

1. In upholding the Hospital's immunity from damages liability for its termination of Dr. Bryan's staff privileges, the Eleventh Circuit examined the statutory scheme in detail. It observed that the HCQIA was enacted because "Congress found

that "[t]he threat of private money damage liability under [state and] Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.'" A. 9. In an effort "to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action . . . Congress granted immunity from monetary damages to participants in properly conducted peer review proceedings while preserving causes of action for injunctive or declaratory relief for aggrieved physicians." A. 10-11.

Thus, the HCQIA provides complete immunity from damage awards for peer review actions taken "(1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts. . . ." 42 U.S.C.A. § 11112(a). The peer review action is presumed to have met those standards "unless the presumption is rebutted by a preponderance of the evidence." *Id.*

Petitioners' challenge to the Eleventh Circuit's construction and application of this statutory immunity is founded on their disagreement with the court's conclusion that "the statute's reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard."[2] A. 14-15; *see also* A. 45. This construction of the HCQIA was, however, reached by time-honored means, and it is an entirely reasonable construction.

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[2] The court also held that Dr. Bryan had, in any event, failed to establish that any personal animosity of the individual defendants "determined the outcome of the peer review process." A. 45.

The Eleventh Circuit carefully reviewed the language of the HCQIA. By its express terms, the Act does not impose any standard of "good faith" but rather requires the "reasonable belief that the action was in the furtherance of quality health care" and "the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts. . . ." §11112(a)(1), (4).

The court also reviewed the legislative history that made clear that Congress intended to adopt this objective standard rather than a subjective "good faith" standard. Thus, although a "good faith" standard was initially considered, this was abandoned in favor of a more objective "reasonable belief" standard:

> The Committee intends that *this test will be satisfied if the reviewers*, with the information available to them at the time of the professional review action, *would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.*[4]

H.R. Rep. No. 903, at 10, 99th Cong., 2d Sess. 12, reprinted in 1986 U.S.C.C.A.N. 6393 (A. 302) (cited by the Eleventh Circuit in the instant case, (A. 15, 44)) (emphasis supplied).

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[4] Petitioners also argue that the Eleventh Circuit erred in relying on this statement in the House Energy and Commerce Committee report, suggesting that subsequent amendments made the report irrelevant. That is simply not the case. No subsequent amendment changed the governing standard from the objective test back to the originally contemplated "good faith" test. The Eleventh Circuit's reliance on the Committee's statement as indicating the legislative intent with respect to the "reasonable belief" standard was completely proper.

Further, the court considered and followed the only circuit court decision that had addressed this issue at the time. In that decision, *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992), the Ninth Circuit, citing the same legislative history, expressly held that "[t]he test is an objective one, so bad faith is immaterial. The real issue is the sufficiency of the basis for the [Hospital's] actions." It is *this* language from *Austin*, *quoted* by the Eleventh Circuit at A. 45, that petitioners complain of, without disclosing that the Eleventh Circuit was simply concurring in the Ninth Circuit's construction of the Act.

Significantly, each of the circuit courts that have addressed this issue have concluded that an objective standard is to be applied in determining the reasonableness of the peer review process. *See Imperial v. Suburban Hospital Ass'n, Inc.*, 37 F.3d 1026, 1929 (4th Cir. 1994) ("the standard is an objective one which looks to the totality of the circumstances"); *Smith v. Ricks*, 31 F.3d 1478, 1485 (9th Cir. 1994) ("[T]he 'reasonableness' requirements of § 11112(a) were intended to create an objective standard, rather than a subjective standard"); *Fobbs v. Holy Cross Health Care System Corp.*, 29 F.3d 1439 (9th Cir. 1994), *aff'g* 789 F. Supp. 1034 (E.D. Cal. 1992) (Congress chose an "objective" standard for HCQIA), *cert. denied*, 63 U.S.L.W. 3559 (U.S. Jan. 23, 1995) (No. 94-994); Furthermore, although petitioners assert that the filing of opposing amicus briefs below by the American Medical Association and the American Hospital Association demonstrates the need for "guidance" from this Court on the proper interpretation of the Act, [Pet. at 14, n.14], *all* of the amici acknowledged that the Hospital's entitlement to immunity from damages must be determined on the basis of an "objective" rather than a "subjective" standard. [AMA 7-8; AHA 7-8].

In short, the Eleventh Circuit's decision comports with (1) all of the decisions of other circuits on this issue, (2) the express statutory language, which nowhere imposes a standard of subjective "good faith" but rather expressly imposes a standard of "reasonableness," and (3) the legislative history, which establishes that Congress considered a "good faith" standard but specifically

changed to a "more objective 'reasonable belief' standard." There is nothing extraordinary about the court's construction of the Act or the principles it utilized in reaching that construction. The petition is nothing more than an expression of dissatisfaction with the outcome of the Eleventh Circuit's decision in this case and presents no substantial question warranting review by this Court.

2. Petitioners further claim that the Eleventh Circuit has "created a 'new' standard to be applied in the litigation of HCQIA cases." Pet. at 20. According to petitioners, the court "has specifically ruled that the question of whether a defendant has complied with the four immunity standards of the HCQIA . . . is never a question for the jury, even if there exist genuine issues of fact." *Id.*

As shown on the face of its opinion, the court made no such ruling. Rather, the court simply held that the "*ultimate* question" of immunity from monetary liability under HCQIA is for the court to resolve, and it expressly stated that "disputed subsidiary issues of fact concerning HCQIA immunity" *are* to be submitted to the jury by way of special interrogatory. A. 39-40; *see also* A. 42. Where, however, the "evidence at trial *conclusively* demonstrates that the defendant has satisfied HCQIA standards for peer review procedures . . . then the court should grant a post-trial judgment as a matter of law under Rule 50(b)." A. 42 (emphasis supplied).

This interpretation of the Act is fully consistent with its avowed statutory purpose to remove the threat of monetary liability against those who participate in a peer review process meeting the standards set forth in the Act. That is exactly why Congress created a rebuttable presumption of immunity for such a process. The "unusual" standard that petitioners assail was established by Congress when it enacted the HCQIA, *not* by the Eleventh Circuit in the decision below.

Moreover, petitioners' contention that the Eleventh Circuit has created a "new" standard for summary judgment motions in HCQIA cases is plainly wrong. The Eleventh Circuit did nothing

more than give effect to this express statutory presumption by requiring the complaining physician to come forward with evidence establishing that the objective standards of the Act were not satisfied. A. 42. Absent such proof, judgment must be entered granting immunity from damages to the peer review participants. A. 40-42. Once again, the court's holding is completely consistent with the decisions of other circuit courts holding that such immunity should be granted as a matter of law when the standards of the Act are satisfied. *See Imperial*, 37 F.3d at 1030; *Smith*, 31 F.3d at 1485, 1487; *Fobbs*, 29 F.3d at 1443; *Austin*, 979 F.2d at 733-34.

Furthermore, contrary to petitioners' argument, this construction does not represent an improper extension of the teachings of this Court with respect to the grant of qualified immunity in Section 1983 cases. The court merely cited *Mitchell v. Forsyth*, 472 U.S. 511 (1985), for the proposition that "[i]n qualified immunity cases, the favored approach is to have the immunity determination made by the court, prior to trial, whenever possible." A. 39 n.26. Petitioners' quarrel is not with the Eleventh Circuit's reliance on the teachings of Section 1983 cases, but rather with the court's conclusion that petitioners failed to present evidence sufficient to create a genuine issue under the standards imposed under the HCQIA.

Petitioners further argue that the Eleventh Circuit's construction of this statutory presumption of immunity deprives them of their Seventh Amendment right to a jury trial. However, the mere fact that judgment must be rendered against petitioners as a matter of law, whether under Rule 50 or 56, does not implicate the Seventh Amendment. In order to create a triable issue for the jury, a plaintiff must be able to demonstrate a genuine issue of fact that is material under the applicable substantive law. The Eleventh Circuit simply found that petitioners had failed to do that and hence there was nothing for the jury to determine in *this* case.

The Eleventh Circuit's decision is fully consistent with the language of HCQIA and its intent to bolster the pre-existing

reluctance of courts to interfere with staffing decisions of governing bodies of hospitals by providing a presumed immunity from monetary damages. Petitioners' attempt to portray far-reaching ramifications of the Eleventh Circuit's decision is merely the familiar argument of a party disappointed over the outcome of an appeal.

3. Petitioners also assert that they rebutted the HCQIA presumption "as a matter of law" by presenting evidence that (a) "direct economic competitors" participated in the peer review proceedings, (b) the proceedings were conducted in "bad faith," and (c) the termination was motivated by "improper economic reasons." Pet. at 29. This contention is refuted by even the most cursory review of the record.

First of all, as petitioners concede [Pet. 28], the HCQIA only requires that the members of the hearing panel not be economic competitors of the physician being reviewed; there is no requirement that competitors avoid participation in *other* aspects of the peer review process. Here, as the Eleventh Circuit pointed out, "none of the panel members were . . . Bryan's direct economic competitors." A. 28-29 n.16. The express requirements of the HCQIA were accordingly satisfied. Moreover, even under Dr. Bryan's expanded view of the HCQIA requirements, no economic competitors participated in other parts of this peer review process. Although Dr. Bryan states that Drs. Gurri and Armstrong were his "direct economic competitors," the trial court specifically determined that they were *not* competitors of Dr. Bryan, and should accordingly be dismissed from the case, a ruling that Dr. Bryan did not challenge on appeal. R20-5-6. *See also* R15-679; R17-1370.

Second, despite petitioners' repeated references to the jury's and the district court's supposed "findings" that the Hospital acted in "bad faith," no such findings were made. A. 36. Moreover, the Eleventh Circuit specifically determined, based on its review of the record, that the hostility of certain members of the Medical Staff was *not* the cause of the Board's termination of Dr. Bryan's

staff privileges and that the Board was instead motivated by concerns for quality patient care – concerns that were raised by complaints of incidents that Dr. Bryan *acknowledged* had occurred. A. 44-45. Courts throughout the country have recognized that disruptive behavior such as Dr. Bryan's is a proper basis for disciplinary action. *See Mahmoodian v. United Hospital Center, Inc.*, 404 S.E. 2d 750, 760-61 (W. Va. 1991) (citing numerous state and federal decisions to that effect), *cert. denied*, ___ U.S. ___, 112 S. Ct. 185 (1991) (cited by the lower court at A. 51).

Third, petitioners' contention that the Hospital was improperly motivated to terminate Dr. Bryan's staff privileges because his surgeries for Medicare patients "lost money for the hospital" [Pet. 29-30] is also belied by the record. Although it is true that petitioners contended Dr. Bryan showed a loss on his Medicare patients, it was undisputed that he showed a substantial profit on his non-Medicare patients and was highly profitable for the Hospital on an *over-all* basis. Pl. Ex. 397, R17-1155. Indeed, of the Hospital's staff of some 220 doctors, he was the thirteenth or fourteenth most profitable doctor. *Id.*; R24-2664. Dr. Bryan's economic expert frankly conceded there was no economic reason for the Hospital to terminate Dr. Bryan's privileges "when you consider the total patient mix. . . ." R17-1320-21.

As can be readily seen, the petition amounts to nothing more than a request to reexamine the record and the lower court's decision in light of that record. It is not, however, the function of this Court "to grant a certiorari to review evidence and to discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

4. Petitioners finally urge this Court to exercise its "power of supervision" because, according to petitioners, the Eleventh Circuit "departed from the accepted and usual course of proceedings" by failing to identify the standard of review it was applying. Pet. at 31-32. The Eleventh Circuit did, however, specify the standard of review it was applying, A. 40-42, and that

standard of review is consistent with the well-settled precedent cited by the court.

In sum, the Eleventh Circuit's decision does not conflict with any decision of this Court or any other Court of Appeals. Petitioners simply disagree with the lower court's application of the HCQIA standards to the peer review proceedings afforded Dr. Bryan and its conclusion that the Hospital's peer review action complied with those standards. There is no substantial issue that warrants review by this Court of this fact-bound decision.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

February 23, 1995

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